BRIEF IN SUPPORT OF THE FOREGOING PETITION

POINT I

Under Connecticut law, which the Circuit Court was required to apply, and New York law, which it purported to apply, Blackburn had no power to reapply the payments received from Sherman, without direction, at a time when only the Newtown indebtedness existed, to claims accruing long after the payments were received, in order to charge the petitioners, upon their bond, with the full amount of the Newtown deliveries.

As appears from the Circuit Court's opinion, it is undisputed "that all of the deliveries by Blackburn to the Newtown job were made between July 19, 1939, and January 9, 1940, and that the moneys paid by Sherman to Blackburn *during that period* were sufficient in amount to cover Sherman's indebtedness on the Newtown job" (149 Fed. (2), 301, 304).

It is likewise undisputed, upon the record, that *none* of the indebtedness to which those payments were subsequently applied was in existence, or even contemplated, between July 19, 1939, and January 9, 1940, when the payments were made and received. As appears from Blackburn's own records, Exhibit M-50 (R., 580) and Exh. 22 (R., 552), every one of the deliveries made by Blackburn after January 9, 1940—the date of the last delivery to the Newtown job—was made to Sherman's Dannemora, Coxsackie, Bedford Hills and Beacon jobs. Prior to January 9, 1940, and at the time that the aforementioned payments from Sherman were received by Blackburn, not a single penny of indebtedness was due to

Blackburn upon any one of these deliveries, each one of which was made after January 9, 1940, in most instances, many months after. *The only indebtedness existing at the time that the payments between July 19, 1939, and January 9, 1940, were made, was the indebtedness on the Newtown job* (149 Fed. (2), 308-309).

Upon these uncontroverted and conceded facts, the principle of allocation or appropriation of payments, invoked by the Circuit Court, simply does not exist. By its ruling that such a doctrine applies to the instant case, empowering the creditor to make an application of the payments, within a reasonable time after their receipt, "to debts not yet matured", even though only one indebtedness was in existence when the payments were made, *the Circuit Court has formulated a rule of law which is entirely unique in the law of payment.* Its decision contravenes the law of Connecticut, which it was required to apply, as well as the law of New York which it purported to apply. It is unsupported by the common law of the various states, the common law of England and the Roman Civil law from which the doctrine of allocation was first obtained.

Under the law, as it existed and was universally applied before the Circuit Court's decision in this case, a creditor who receives a payment from his debtor, without direction, at a time when only one debt exists, *has no choice, no right to allocate, no power to elect.* He *must* apply it upon the existing debt and the law will do so even if he does not. By that application of law, the debt is *instantly* discharged upon the creditor's receipt of the payment.

That the Circuit Court's contrary view is opposed to the law of Connecticut is apparent from the decision by the Supreme Court of Errors of *Connecticut in Blinn* v. *Chester,* 5 Day (Conn.) 166. In that case, the defendant made a payment of $30 "without any direction as to the

application of it" (p. 167). At that time, the defendant owed the plaintiff upon a written contract. There was also, at that time, an unsettled book account between them. The plaintiff applied the payment to the book account, contending that "if the debtor at the time of payment does not direct to what account it shall be applied, the creditor may at the time have his election in making the application." The defendant contended that the payment had to be applied, as a matter of law, to the contract indebtedness, and that the creditor had no power of election whatever because (p. 167):

> "There was no evidence of any existing debt in favor of the plaintiff except what was due upon that contract. If there was only one debt, the payment must necessarily be applied in discharge of that alone. In the cases, both in *Vernon* and *Cranch,* there were two existing debts. In the present case, it is only stated that there was an unsettled book account subsisting between the parties; but it does not appear that the defendant was in arrear to the plaintiff."

In sustaining the contention that the plaintiff had no power of allocation or appropriation where only one indebtedness existed at the time that the payment was made, the Supreme Court of Errors, per Reeve, J., declared:

> "In this case, there does not appear to be any debt due to the plaintiff from the defendant except what arose out of the contract. It is true that there was an unsettled account; but from this, no inference can be made that the defendant was in arrear on that account to the plaintiff. It might as well be inferred that the plaintiff was in arrear to the defendant. *There was, then, no debt due, but that upon the contract. There was no need of any direction to the plaintiff to apply the payment to this debt. The law made the application of it to this;* and this is all the defendant claims." (Italics ours.)

The foregoing principles of law have been constantly reiterated and applied by Connecticut's highest Court. "These payments should have been accepted and applied to that portion of the indebtedness and to the notes due when these payments were made. When so applied, the debt or debts now said to be due when this action was brought were necessarily extinguished" (*Schwartz* v. *Dashiff*, 92 Conn. 135, 138.) A payment cannot be applied, "where no direction has been given by the debtor, to a demand not due when payment is made, if there be another debt already due" (*Stamford Bank* v. *Benedict*, 15 Conn. 437, 443).

The law of New York is identical. In *Stone* v. *Seymour*, 15 Wend. 16, Chancellor Kent, discussing the doctrine of allocation under the civil and common law, declared at page 21:

> "A fourth principle appears to be equally well established, to wit: where no application of the payment is made by the debtor or with his assent at the time it is received, *and there is an existing indebtedness to the amount of such payment, it shall be applied to that; and neither the creditor or the Court shall apply such payment to a debt which was not then due and payable.*" (Italics ours.)

In *Shipsey* v. *Bowery National Bank*, 59 N. Y. 485, the New York Court of Appeals declared at page 492:

> "The plaintiff, when the money was received, made no specific appropriation. If he had distinct causes of indebtedness, he was not obliged immediately to designate where it should be applied. He then would have a reasonable time in which to elect. (*Sheppard* v. *Steele*, 43 N. Y. 52.) He did, in a reasonable time, make an election to apply it toward payment of other unpaid and protested checks drawn by Merritt, and held by plaintiff. *But this it is claimed that he could not do, because*

Merritt was not then indebted to him thereon; that the only indebtedness was on the lost check; and that where there is but a single indebtedness, by operation of law, any payment is at once applied upon that. This conclusion would follow if the premises were correct." (Italics ours.)

Again, in *Baker* v. *Stackpoole,* 9 Cow. (N. Y.) 420, 436:

"No case has been cited, and I presume none can be found, carrying the creditor's right so far as to retain money in his hands to apply upon any future indebtedness, leaving a prior demand unpaid. The moneys received by the respondent, therefore, should be applied to pay, as far as they went, all the claims he had * * *" [semble: *North American Fisheries & Cold Storage, Ltd.* v. *Greene,* 195 App. Div. 250; *Niagara Bank* v. *Rosevelt,* 9 Cow. (N. Y.) 409].

The Circuit Court's ruling likewise contravenes the common law of the various States, exemplified by the decision of the Supreme Court of South Carolina in *Reid* v. *Wells,* 56 S. C. 435, 442; 34 S. E. 401, 403:

"The rule is too well settled to need a citation of authority to support it, that where a person owes two debts to another and makes a payment to the creditor, the debtor has a right to direct the application of such payment, provided such direction is given before or at the time of making such payment; but if no direction is thus given, then the creditor may apply such payment to either of the two debts as he may see fit. * * * Under the terms of the rule, it must appear that the defendant owed *two* (italics are the Court's) debts to the plaintiff; and we agree with the Circuit Judge in holding that the plaintiff utterly failed to show that the defendant owed him anything on the open account. Hence, even if the defendant never gave the plaintiff any directions as to the application of the proceeds *of her cotton, such proceeds must*

> *necessarily be applied to the only debt which has been shown to be due by the defendant to the plaintiff,* to wit: the debt secured by the note and mortgage." (Italics ours.)

Similarly, in *International Harvester Co.* v. *Holmes,* 165 Wisc. 506, 510; 162 N. W. 925, 926, 927, the issue presented was phrased by the Supreme Court of that State as follows:

> "Could the plaintiff apply the voluntary payment made by the mortgagor to the notes not yet due to the prejudice of the guarantor of the note which was then past due?"

Its ruling was as follows:

> "There is no dispute that when a debtor makes a payment without application a creditor cannot apply the amount of the payment to a debt not due, to the exclusion of one due or overdue. 30 Cyc. 1237, and cases cited; *Cain* v. *Vogt,* 138 Iowa 631, 116 N. W. 786, 128 Am. St. Rep. 216. Therefore, as against the defendant, *the plaintiff was bound to apply the proceeds of the voluntary payment to the notes in the order of their maturity. Upon making such application the note guaranteed by the defendant must be held to be paid, and the* defendant discharged." (Italics ours.)

The English common law is identical. In *Lamprell* v. *Billericay Union,* 3 Exch. 283, 307, 154 Eng. Rep. 850, 860, the English Court declared:

> "But before any such question can be raised (*i.e.,* the creditor's right of election), *it is plain that there must be two debts.* * * * On these grounds we think that the doctrine as to the creditor's right, by applying indefinite payments to whichever of two debts he may prefer, does not apply in the present case. (Italics ours.)

Munger, Application of Payments, p. 48, citing a host of authorities, states:

> "The claims upon which the creditor makes application must at the time be due and payable. He cannot apply it to a debt not than payable and demandable, if there be another debt then due; nor partly on debts then due and partly on debts not then due; nor retain it in his hands to apply upon a future indebtedness, leaving a prior demand unpaid; nor, where he has an existing claim against the debtor, apply the payment to extinguish his contingent liability on a note which he has endorsed for him."

Under the Roman Civil law, as set forth in full at pages 5 to 9 of Munger, *supra*, it is declared that the creditor's right to allocate, in connection with payments received from a debtor, without direction, a principle known to the Civil Law as "imputation of payments", depends, as a *sine qua non* to the exercise thereof, upon the existence of more than one due and payable obligation at the time that the payment is received (Semble: *Williston, Contracts*, vol. 6, §1797, p. 5111 and cases cited; *Restatement of the Law of Contracts*, §389 (a)).

In the instance case, the payments received by Blackburn from July 19, 1939, to January 9, 1940,—ranging over a period of six months to three weeks before the attempted allocation herein—would be applied by the Connecticut, New York, common law and civil law to the immediate extinguishment of the Newtown indebtedness which cannot, thereafter, be revived against the petitioners, as principal and surety upon a statutory bond, by the action of Blackburn acting alone or in concert with his debtor.

Judge Clark's attempted distinction of the cases that the petitioners "so much stress" upon the ground that they "involved a dispute as to allocation between debtor

and creditor" and not between a creditor and third persons derivatively liable (149 Fed. [2d], 301, 307) is simply without foundation in fact. *International Harvester Co. of America* v. *Holmes,* 165 Wisc. 506, 510; 162 N. W. 925, 926-927, involved the guarantor of a note and the holder thereof; *United States, to Use of Jackson Ornamental Iron & Bronze Works* v. *Brent,* 236 Fed. 771, involved a materialman and a surety, precisely as here; and, similarly, in *U. S. Fidelity & Guaranty Co.* v. *Eichel,* 219 Fed. 803 and *Columbia Digger Co.* v. *Rector,* 215 Fed. 618, the issue likewise involved a surety and a creditor (Semble: *Wait* v. *Homestead Building Association,* 81 W. Va. 702, 95 S. E. 203; 40 Am. Jur., Payment, §116, and cases cited).

The Circuit Court's conclusion to the contrary is utterly unprecedented in the law of payment and constitutes a complete negation of the Connecticut law which it was required to, but did not, apply (*Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Klaxon* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487, 496; *Griffin* v. *McCoach,* 313 U. S. 498).

POINT II

In failing to construe the words "a party who has not been paid therefor" contained in the Connecticut statute and the surety bond issued thereunder, as those words would be interpreted by a Connecticut court under Connecticut law, the Circuit Court improperly ignored the full faith and credit provisions of the Federal Constitution.

In this case, and by the assertion of its claim against McGraw and Aetna, Blackburn sought to invoke for its benefit, the provisions of a statute enacted by the State of Connecticut, [Sect. 540d (r), General Statutes, Supp. 1937.] That statute required the petitioners' execution of a surety bond which, according to Blackburn, inured to

its benefit because it had furnished materials in the State of Connecticut to a Connecticut project constructed under a Connecticut contract between McGraw and the State of Connecticut. The bond, likewise, had been executed by the petitioners in the State of Connecticut as a Connecticut obligation, filed with the Connecticut Commissioner of Public Works and performable in Connecticut. Under the Connecticut statute, as well as by the terms of the bond itself, the instrument inured to the benefit of a party who furnished materials or supplies or performed labor in the prosecution of the work, and "who has not been paid therefor".

In short, the State of Connecticut, in creating a statutory right which has never existed before, for the benefit of those persons who had performed labor upon, or furnished materials to, a public work in the State of Connecticut (*Pelton & King* v. *Town of Bethlehem*, 109 Conn. 547) had circumscribed that right by attaching thereto the express statutory condition that the only party who can avail himself thereof is a party "who has not been paid therefor." No claimant can recover under the Connecticut bond prescribed by Connecticut law for materials delivered in Connecticut to a Connecticut project who does not satisfy the condition that he be a party "who has not been paid therefor."

The question is thus presented: *what law shall determine whether the condition precedent to the liability under the statutory bond has been complied with? What law shall determine whether the claimant is a party "who has not been paid therefor"?*

The petitioners respectfully submit that, under the full faith and credit provisions of the Federal Constitution, the State which created the obligation sought to be enforced, the State which created the condition to the enforcement of that obligation, is the only State whose law can define and determine the meaning, scope and content of the condition which itself has imposed (*New*

Britain Lumber Co. v. *American Surety Co.*, 113 Conn. 1; *Cf. Tenn. Coal Co.* v. *George*, 233 U. S. 354, 360; *Bradford Elec. Co.* v. *Clapper*, 286 U. S. 145, 160; *Hutchinson* v. *Ward*, 192 N. Y. 375; *Restatement, Law of Conflict*, §618).

The issue in the instant case is not whether Blackburn and Sherman, for obvious reasons, had reached an agreement between themselves, that Sherman owed Blackburn money for the Newton deliveries. Sherman could confess any judgment to Blackburn that it pleased. It could subject itself to any liability that it chose. It could not, however, by any such conduct, subject the petitioners to any liability greater or different than the liability created by the Connecticut statute. This case does not involve a suit by Blackburn against Sherman predicated upon an alleged admission of liability. It involves a claim by Blackburn against McGraw and Aetna upon a statutory bond, Blackburn asserting that, under the applicable Connecticut Statute, he is a party "who has not been paid" for his Newtown deliveries. In order to recover under the surety bond prescribed by Connecticut law, Blackburn was required to establish that he was an "unpaid" party *under the law of Connecticut*, not under the law of New York. In ruling to the contrary, the Circuit Court of Appeals adopted a rule which would not even be applied by the New York Courts, had this cause been tried in New York.

In *Graybar Elec. Co.* v. *New Amsterdam Cas. Co.*, 292 N. Y. 246, the New York Court of Appeals was required to determine a materialman's suit against a contractor under a surety company bond filed by the contractor upon a Tennessee project, as required by a Tennessee statute. The defendants claimed that the plaintiff had failed to comply with the conditions prescribed by the statute as necessary to a recovery. After emphasizing that the bond was a statutory bond, "made and delivered in Tennessee and was there to be performed", the New York Court of

Appeals ruled that the provisions of the Tennessee statute "were limitations of the liability undertaken upon the bond in suit" and that:

> "The Tennessee statute (as so construed by the highest court of that State) must here be accorded the full faith and credit which is enjoined by the Federal Constitution in respect of the 'public acts' of a sister State. (John Hancock Ins. Co. *v.* Yates, 299 U. S. 178.)

As we have shown above, under the facts herein disclosed, if Blackburn were a Connecticut resident, conducting all of his business in the State of Connecticut, he would not be deemed by the Connecticut Courts a party "who has not been paid therefor." The result, therefore, of the Circuit Court's ruling is to permit a recovery by non-residents and non-citizens of the State of Connecticut which that State, by its own law, under the statutory liability which itself has created, would deny to its own citizens and residents. That is precisely what is forbidden by the full faith and credit clause of the Constitution. Where one State makes the existence of a statutory right conditional upon some act or event, no suit can be maintained in another State unless the condition is satisfied in accordance with the law of the creating State [*Restatement of the Law of Conflicts,* §618, and authorities cited].

"The courts of the sister state, trying the case, would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action, or which name conditions on which the right to sue depend" (*Tenn. Coal Co.* v. *George,* 233 U. S. 354, 360). "To refuse to give that defense effect would irremediably subject the Company to liability. Because the statute is a 'public act', faith and credit *must* be given to its provision * * *" (*John Hancock Mutual Life Ins. Co.* v. *Yates,* 299 U. S. 178, 183).

The foregoing principles are particularly applicable to a Federal Court. "* * * since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the state, it cannot afford recovery if the right to recover is made unavailable by the state nor can it substantially affect the enforcement of the right as given by the state" (*Guaranty Trust Co.* v. *York,* 65 Sup. Ct. 1464, June 18, 1945.)

American Woolen Co. v. *Maaget,* 86 Conn. 234, in so far as it ruled that, upon the facts therein, New York law governed the alleged allocation of payments, does not apply to the instant case. In that case, the Court was confronted with a completely New York transaction, involving an ordinary common law action for goods sold and delivered in New York, arising between a New York vendor and vendee. It did not involve a third party derivatively liable upon a statutory cause of action created by Connecticut legislation, involving Connecticut deliveries to a Connecticut project by a materialman who sought to recover against the principal and surety upon a Connecticut bond by asserting a claim that, as to such third persons, he was a party "who has not been paid therefor."

CONCLUSION

The writ of certiorari should be granted as prayed for.

Dated, August 16th, 1945.

Respectfully submitted,

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LOUIS A. TEPPER,
Counsel for Petitioners.

(18)

Supreme Court of the United States

OCTOBER TERM, 1945

No. 347

F. H. McGRAW & COMPANY, INC.,
Plaintiff-Petitioner,

v.

JOHN T. D. BLACKBURN, INC.,
Defendant-Respondent,

and

THE AETNA CASUALTY & SURETY COMPANY,
Third Party Defendant-Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioners present one point (though argued as two) namely, that Blackburn, contrary to the law of Connecticut, instead of applying the money he received from Sherman to the only existing debt, allocated it to claims accruing thereafter. They are confined to this point (*Steele* v. *Drummond,* 275 U. S. 199).

Summary of Argument

Respondent argues that:

1. The evidence shows that the application of January 24, 1940 was made upon debts actually due for previous shipments.

2. The law of New York controls, and that law is the same as that of Connecticut.

3. Under New York as well as under Connecticut law petitioners have no right to object to the allocation, the debtor consenting.

We urge therefore that (a) there is no question of law, or any of importance, before this Court, and (b) there is no ground for believing that the Circuit Court probably decided a question of local law in conflict with the applicable local decisions under Rule 38, Subd. 5(b). To grant the application for a writ would in effect merely give another hearing to a defeated party in the Circuit Court where he has already had *two* hearings,—something this Court does not regard within its certiorari jurisdiction (*Magnum* v. *Coty*, 262 U. S. 159, 163).

POINT I

The evidence shows that the application of January 24, 1940 was made upon debts actually due for previous shipments.

To make their point petitioners set forth as "undisputed" fact that on January 24, 1940 no account was open except the Newtown, no deliveries were made from July 19, 1939 to January 24, 1940 to any other job and hence the money received from Sherman was allocated to deliveries made thereafter to *Coxsackie* and three other jobs. None of these statements is true. The burden is on the petitioners, and that they recognized by pleading payment (R. 50, 58); *Lewis* v. *So. Shore etc. Assn.*, 211 App. Div. (N. Y.) 831. The record, i.e. Blackburn's ledger cards (Ex. M-50, at R. 580), the analysis of the cards (Ex. 22, at R. 552), the invoices (Exs. 3 and 4, R. 526, unprinted but exhibited to the Circuit Court), and Blackburn's explanatory testimony tell an altogether different story.

These records and the allocation were savagely attacked as the work of Satan—all in vain (149 Fed. 2nd 305), and even Judge Hutcheson found more heat than light (149 id. 308).

The ledger cards, the key-numbers used by the bookkeeper being explained (R. 456-458), are perfectly clear. Not every debit entry indicates a shipment. Debits preceded by a .30 next to the invoice number are charge-backs of defaulted checks, notes and trade acceptances therefore credited as payments. Only .10 debits indicate shipments. All credits, whether by cash or paper, are shown by a .20 on the credit side. When the paper was dishonored the amount previously credited (plus interest and protest fees) was charged back in the debit column following a .30.

Examining Exhibits 22 and M-50 we find:

(1) From Jan. 18/38 to Jan. 24/40		
Shipments to Newtown job...	*$13,622.33	
Shipments to other jobs.....	31,373.18	$44,995.51
(2) From July 19/39 to Jan. 24/40		
Shipments to Newtown job ..	9,009.64	
Shipments to other jobs	**13,005.48	
(3) Cash payments from Jan. 18/38 to Jan. 24/40		30,301.83
(4) Balance due on Jan. 24/40		
Newtown	9,009.64	
Others	5,684.04	14,693.68

The foregoing summary disproves every assumption of fact upon which the petitioners have based the only

*$4,622.69 (paid for) before July 19, 1939 and $9,009.64 after July 19, 1939 (still unpaid).

**$1,653.57 to Coxsackie and $11,351.91 to other non-Newtown jobs.

ground of their petition. The story of only one debt existing on January 24, 1940 is fictitious; there were then fourteen *other* debts aggregating over five thousand dollars. The letter of January 24, 1940 (Ex. 24, at R. 554) acted as an application of the total payments, *i. e.*, $30,301.83 to the non-Newtown shipments, leaving the whole of the Newtown obligation unpaid, as well as $5,684.04 on the other deliveries. There was no need of creating allocations upon future shipments.

If anything else were required to refute petitioners' argument, we find it at hand in the post-January 24, 1940 ledger account:

Shipments after January 24, 1940	$6,404.34
Debt carried over from the preceding period	14,693.68
Total Liability at close of account	$21,098.02
Payments after January 24, 1940	11,183.27
Unpaid at close of account	10,115.75

This total corresponds substantially with final balance shown in the balance column of Ex. M-50. *Not one dollar of these payments after January 24, 1940 came from McGraw,* its last payment ($500.00) having been made on January 10, 1940 (Ex. M-6, not printed, offered and received in evidence at R. 217, referred to at R. 572).

This sum is made up of the Newtown debt of $9,009.64 and the following balances on non-Newtown jobs: pre-January 24, 1940, $473.96, and $632.15 after that date—as shown by Ex. 22.

In spite of this record proof petitioners at every turn continue to make statements which have no support anywhere in the testimony or the documentary evidence. Even Judge Hutcheson (tho he dissented) agrees that both the district judge and the majority of the Circuit Court assumed that during the critical period there was in existence a running account of more than one debt

(petition p. 8). Petitioners finally turn to the Findings (petition, p. 3). They quote the first half of Finding No. 22 to the effect that, if the payments in Finding No. 20 were all applied against the earliest sales then unpaid, the Fairfield (Newtown) job would be deemed fully paid and discharged, but they fail to quote the second half, which reads:

> "But, if Sherman's said payments be deemed all applied against indebtedness for material furnished for jobs other than the Fairfield job, then Blackburn's claim of $9,009.64 for the material furnished to the Fairfield job remains wholly unpaid."

Finding No. 23 of which petitioners quote only a part on page 3 of their petition, reads as follows:

> "There is no proof that prior to January 22, 1940 Blackburn manifested an intent to apply the several payments theretofore made by Sherman to Sherman's indebtedness on account of specific sales of material used elsewhere than in the Fairfield job. On January 24, 1940, at Sherman's request, indeed at Sherman instigation, Blackburn first formulated an intent to apply all payments received from Sherman subsequent to July 19, 1939 to jobs other than the Fairfield job, and on the strength of such allocation, notified McGraw by letter that its account against Sherman on account of the Fairfield job was unpaid to the extent of $8640.16" * * *.

At this point petitioners gratuitously assume that the "other" jobs referred to in the last Finding had to do with those which were commenced after the last delivery to the Newtown project, *i. e.*, January 9, 1940. There is nothing in the Finding to justify so wild an assumption. It would be doing the district judge an injustice to believe that he would so lightly ignore the Blackburn records. The contrary becomes clear when all the findings are read together in the light of the issues before the court. Yet petitioners seriously present these wishful inferences as "undisputed" evidence.

POINT II

The law of New York controls and that law is the same as that of Connecticut.

The contract between Blackburn and Sherman, having been made in New York and calling for shipment and payment there, is governed by the laws of that state (*Holzer* v. *Deutsche, etc., Gesellschaft,* 277 N. Y. 474, 479; *Salimof & Co.* v. *Standard Oil Co.,* 262 N. Y. 220; *American Woolen Co.* v. *Maaget,* 86 Conn. at p. 243). "The law of the place of performance governs the application of a payment to one or another of several debts payable there by the person making the payment to the person receiving it" (Restatement of Conflict of Laws, § 368).

Petitioners nevertheless insist upon shifting the situs to Connecticut on two grounds: (a) *Erie Ry. Co.* v. *Tompkins,* 304 U. S. 64 and (b) the bond sued on is a creature of that state. Now *Erie* v. *Tompkins* in no way interferes with the fact that the New York law in this case controls on the question of allocations. It holds merely that a United States Court in Connecticut, in applying the law of New York, must accept the version of that law laid down by the Connecticut Appellate Courts, whether mistaken or not. In the *American Woolen* case the Supreme Court of Connecticut held that New York follows the "reasonable time" rule. The Circuit Court, in discussing the matter of the timeliness of the application only, felt itself bound by that decision. However, no Connecticut Court has ever ruled on what the New York law is on any other phase of the law of allocations, and certainly not on the New York law as applied to unmatured debts. Strange it is, therefore, for petitioners' counsel to be astonished at Judge Clark's choosing to look to the New York decisions alone for a solution of the present problem. Judge Hutcheson agrees with Judge Clark in this respect (Petition, p. 8, bottom).

Petitioners further contend that we must look to the law of Connecticut for the construction of the phrase "who has not been paid therefor", because respondent owes his remedy on the bond to a statute of that State. There is nothing absolute about the full faith and credit clause, to which petitioners appeal (*Klaxson Co.* v. *Stentor Co.*, 313 U. S. 487, 498). The statute seeks protection from the Constitution only for what is different or unique about it. It cannot, for example, object to construction by foreign Courts (*Allen* v. *Alleghany Co.*, 196 U. S. 458, 464-5). It is interested only in receiving respect for its substantive provisions. The provision that an unpaid materialman or sub-contractor may bring suit on the bond may seem substantive at first glance, but the point is fallacious. The statute lays down no standard or measure of payment. The phrase means merely that the remedy is open to any person related to the improvement who has a cause of action. It goes without saying that such a person's claim has not been paid and that his claim is based upon a legal and sufficient consideration. To be consistent petitioners must take the stand that all of these matters must be decided by Connecticut law. The statute intimates no such result. It is altogether silent on this point. The statute undoubtedly assumed that non-resident contractors would enter bids and that contracts between non-residents would result, who would base their conduct upon the law of their own jurisdiction. The statute clearly left it to that law to determine whether the complaining party had been paid.

Graybar Electric Co. v. *New Amsterdam Gas Co.*, cited by petitioners on page 22 of their petition, is not in point. That case held that a claimant must comply with the statutory conditions of notice of claim and of time to bring suit. The case did not involve any such condition for bringing suit as is raised by the petitioners in this case.

POINT III

Under New York, as well as under Connecticut law, petitioners have no right to object to the allocation, the debtor consenting.

Petitioners' Point One is an example of the straw-man technique. The Circuit Court is attacked for a decision it has not made. No Court permits a creditor to allocate to an unmatured debt. But suppose, as in our case, the debtor agrees, may third parties complain? To that question the Circuit Court has given a negative answer, rightly holding that the rule is intended only for the protection of the debtor (149 Fed. 2d 306). That question petitioners have not seen fit to argue and support. In *Blinn* v. *Chester*, 5 Day (Conn.) 166 (their Brief page 14) and the two other cases cited on page 16 the controversy was between *debtor and creditor*. So with all the other cases cited, except for a few, which do not represent the general trend and surely not the law of New York or Connecticut.

That trend is based upon the principle (as the Circuit Court phrases it) "that mutual assent may validate either a change in application or an original application otherwise not permissible" (149 Fed. 2nd 306). That "otherwise" does not confine itself to applications made to unmatured debts but holds good with respect to other phases of the law of allocations. Indeed, the role of third persons in this connection is insignificant, unless they have equities on their side equivalent to a trust. As was said in *Harding* v. *Tifft*, 75 N. Y. 461, 464: "The equities referred to, however, are usually equities existing *between the debtor and creditor*, and I have found no case recognizing those arising out of transactions between the debtor and third persons of which the creditor has no notice." So, Professor Williston (Contracts, Vol. 6, § 1804): "The debtor and creditor have ordinarily exclusive power to determine the application of payment, and in exercising this power are not obliged to consider

the interests of other persons, such as sureties, unless the source from which the payment is derived (and, perhaps the creditor's knowledge of that derivation), imposes a duty on the debtor or creditor." To the same effect: 48 Corp. Jur. § 123, p. 663; *U. S.* v. *Phila. etc. Bank,* 272 Fed. 371 (Mod. 263 Fed. 778); *Grant* v. *Keator,* 117 N. Y. 369, 377; *Louis* v. *Bauer,* 33 App. Div. (N. Y.) 287. *Re Stacy Wolf Hat Co.,* 99 Fed. 2d 793, 795. This general principle was followed in a Connecticut case (*Tomlinson Carriage Co.* v. *Kinsella,* 31 Conn. 268, 272-273) where the Court approved, *as against a third person,* an allocation to an *illegal* debt which the debtor had agreed to. *Connecticut would undoubtedly apply the same logic with respect to every other application which the creditor may not make without the debtor's consent.* This Court in *Field* v. *Holland,* 6 Cranch. 8, 28, says that application may not be made to a debt not due "unless this legal operation of credit should be changed by *express agreement.*" The same problem was solved in a forthright way in *Mack* v. *Adler,* 22 Fed. 570, where sureties (plaintiffs) objected to such an allocation. The Court says at page 572:

> "It will be observed that Poe & Co., the debtors, are not objecting, but consenting to the appropriation made by the creditors. *What right have the plaintiffs to demand a change in the appropriation assented to by the debtor and creditor? Upon what principle can a stranger come between a debtor and his creditor and dictate the appropriation of payments against the will of both?*" (*Italics ours.*)

Petitioners constantly treat the present issue as if the mere receipt of the funds was an allocation in favor of McGraw and the letter of January 24th was a change or revocation once made. The answer is that, even where the creditor has exhausted his right, the debtor may consent to a change of allocation (*Thompson* v. *W. B. Reeve Co.,* 170 Ark. 409; *Re Stacy Wolf Hat Co.,* 99 Fed. 2d 793, 795.

Conclusion

We reiterate that petitioners' argument of the only point submitted has assumed a non-existent state of facts. The petition presents no question of law or any question of importance. We have confined ourselves to the discussion of the point presented by the petitioner. We join with the Milcor Steel Company (by their consent) in their contention that the petitioners irregularly split a single petition into two in violation of the rules of this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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